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No.

In the Supreme Court of the United States

LAURA MERCIER,

Petitioner,

v.

STATE OF OHIO

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Ohio

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Fourth Amendment requires probable cause for the search of a purse being worn or held by an automobile passenger.

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OPINIONS BELOW

The opinion of the Supreme Court of Ohio (App., *infra*, 1a-6a) is reported at 885 N.E.2d 942. The unpublished opinion of the Court of Appeals of Ohio, First Appellate District (App., *infra*, 7a-17a), is available at 2007 WL 1225858. The trial court's order denying the motion to suppress (App., *infra*, 18a) is unreported.

JURISDICTION

The judgment of the Supreme Court of Ohio was entered on April 2, 2008. The jurisdiction of this Court rests on 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The rights of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

The issue in this case is one that arises frequently. A passenger, wearing or holding a purse, attempts to exit an automobile that is subject to police search. Police officers, who lack any probable cause or articulable suspicion with respect to the passenger or the purse, order the passenger to relinquish possession of the purse and leave it behind in

the car. The officers proceed to search the purse as part of the search of the vehicle.

This case presents the question whether such a suspicionless search of the purse is consistent with the Fourth Amendment. The Ohio Supreme Court, joining one other state supreme court, held below that it is. But as the dissenting Ohio justices recognized, that ruling cannot be reconciled with the decisions of three other state supreme courts, which have found a Fourth Amendment violation under identical circumstances. The ruling also is inconsistent with Justice Breyer's recognition, addressing this very situation, that "[p]urses are special containers" that "are repositories of especially personal items," so that "a woman's purse" when "attached to her person" "might amount to a kind of 'outer clothing' * * * which under the Court's cases would properly receive increased protection." *Wyoming* v. *Houghton*, 526 U.S. 295, 308 (1999) (Breyer, J., concurring). Review by this Court is necessary to resolve this conflict and to provide much needed guidance on the rights of vehicle occupants and the authority of police officers during these routine and frequent encounters.

A. Background

On July 17, 2005, petitioner Laura Mercier was a passenger in a car driven by Charles Hagedorn. App., *infra*, 8a. Minutes before police officers stopped the car, Hagedorn sold marijuana to a police informant. This sale occurred outside of the car and outside of the presence of petitioner, who remained in the car during the transaction. After completing the sale, Hagedorn returned to the car and drove off with petitioner. Police officers stopped the vehicle less than two minutes later. *Ibid.*

Police officers questioned Hagedorn, who voluntarily turned over his remaining supply of marijuana. The officers removed Hagedorn from the vehicle and recovered the buy money and rolling papers upon searching his person. Hagedorn was arrested and placed in a police cruiser. App., *infra*, 8a.

The officers then returned to the car and ordered petitioner, who was holding her purse on her lap, to exit the vehicle. They directed petitioner to leave her purse behind, which she did. App., *infra*, 4a. At the time, police officers did not consider petitioner to be either a suspect in any crime or a security threat. When she left the vehicle, petitioner was not under arrest and was free from suspicion of wrongdoing. *Ibid.*

A police officer proceeded to search petitioner's purse. He found an Advil bottle that contained four Adderall pills, which are a form of amphetamine. The officers then arrested petitioner. App., *infra*, 8a.

B. Proceedings Below

1. Petitioner was charged with drug possession. She moved to suppress the evidence obtained from the search of her purse, arguing that a purse being worn or carried by an automobile passenger may not be searched absent probable cause. The trial court denied the motion to suppress. App., *infra*, 18a. Petitioner then pleaded no contest to the charges. *Id.* at 7a.

The Ohio Court of Appeals upheld the trial court's denial of petitioner's motion to suppress. App., *infra*, 7a-17a. The court relied primarily on *New York* v. *Belton*, 453 U.S. 454 (1981), which permits the search of containers located in the passenger compartment of a vehicle incident to the driver's arrest. Because petitioner was in the vehicle with

her purse at the time Hagedorn was arrested, the court concluded that the *Belton* rule authorized the search of petitioner's purse. App., *infra*, 14a-15a. The court rejected petitioner's argument, based on *Wyoming* v. *Houghton*, that because she was wearing or carrying her purse when she was directed to leave it in the car, the purse was exempt from search absent particularized probable cause to search her person. *Id.* at 16a-17a.

2. The Ohio Supreme Court summarily affirmed by a vote of five-to-two, on the authority of *Houghton*. App., *infra*, 1a.

Justice Lanziger, joined by Justice Pfeifer, dissented. App., *infra*, 1a-6a. The dissenters determined that this case presented circumstances "decidedly different from those of *Houghton*, in which the purse was not in the possession of its owner but was found in the back seat of the vehicle." *Id.* at 4a. Pointing to Justice Breyer's concurring opinion in *Houghton*, the dissenters observed that

> [i]f, as Justice Breyer suggests, a purse that is in the possession of its owner should not be considered a container but instead should be considered an item in which a person has a heightened expectation of privacy, the result mandated by United States Supreme Court precedent is decidedly different from the one the majority reaches today.

Id. at 3a. The dissenters accordingly concluded that a passenger "in possession of a purse, either worn or carried, has a reasonable expectation of privacy in its contents," and "reject[ed] the idea that a purse is nothing more than a simple container, subject to

search at will." *Id.* at 5a-6a. They consequently would have reversed in this case, where petitioner "was not under arrest," "was not suspected of any criminal activity," and did not "pose a threat to officer safety." *Id.* at 6a.

In reaching this conclusion, the dissent observed that the majority's holding that the Fourth Amendment permitted the search of petitioner's purse departed from the conclusions of the highest courts of three other states, which have "held that unless there is an arrest or probable cause sufficient to support a search, a woman's purse in her possession or under her control constitutes part of her person and is not subject to search." App., *infra*, 4a-5a (citing *State* v. *Boyd*, 64 P.3d 419 (Kan. 2003); *State* v. *Tognotti*, 663 N.W.2d 642 (N.D. 2003); *State* v. *Newsom*, 979 P.2d 100 (Idaho 1998)). The dissenters agreed with these other courts and would have held that, absent probable cause specific to the passenger, police officers may not instruct a passenger to leave a purse behind in a vehicle so that it may be searched. They observed that this rule would not hinder law enforcement, as it would permit police officers to search a person who is "subject to lawful arrest" and also to conduct, under *Terry* v. *Ohio*, 392 U.S. 1 (1968), "a minimally intrusive search for weapons to protect their own safety when they have a reasonable apprehension of danger." App., *infra*, 6a.

REASONS FOR GRANTING THE PETITION

This case addresses a question that the Court did not reach in *Wyoming* v. *Houghton*: whether police officers may search a purse worn or carried by a vehicle's passenger as part of a lawful search of that vehicle, in the absence of probable cause to search the passenger or the purse. See 526 U.S. at 308

(Breyer, J., concurring). The state supreme courts are irreconcilably split on whether the Fourth Amendment prohibits the search of a passenger's purse under these circumstances.

This confusion stems from two lines of this Court's precedent. On the one hand, the Court repeatedly has held that an individual's mere presence in a location subject to search – including an automobile – or mere association with a criminal suspect does not, without more, justify a search of the individual's *person*. See *United States* v. *Di Re,* 332 U.S. 581, 586-87 (1948); *Ybarra* v. *Illinois,*444 U. S. 85, 91-92 (1979); *Sibron* v. *New York,* 392 U.S. 40, 62-64 (1968). The Court thus held in *Di Re* that, absent probable cause to search *him*, the search of an automobile passenger's pockets and clothing violated the Fourth Amendment. 332 U.S. at 583, 587. The Court has since consistently reaffirmed "the unique, significantly heightened protection afforded against searches of one's person." *Houghton*, 526 U.S. at 303. On the other hand, the Court also has held that *containers* present in an automobile may be searched incident to a legitimate search of the vehicle, applying that rule in *Houghton* to uphold the search of an unclaimed purse that police officers found on an automobile's rear seat. *Id.* at 304-07.

The question here is whether the search of a purse that is *worn or carried* by a woman is a search of the person that is akin for Fourth Amendment purposes to the search of pockets or a billfold.[1] Con-

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[1] As discussed below, this Court has repeatedly recognized a woman's heightened privacy interest in the contents of her purse. The Court need not address the situation of a man in possession of a purse to resolve this case.

curring in *Houghton*, Justice Breyer concluded that it is. In his view, the dispositive consideration in *Houghton* was "that the container * * * at issue, a woman's purse, was found at a considerable distance from its owner, who did not claim ownership until the officer discovered her identification while looking through it." 526 U.S. at 308. Justice Breyer explained that the rule of *Houghton* should not be construed to permit the search of *any* purse located *anywhere* within in a car. Instead, observing that "[p]urses are special containers" containing "especially personal items," Justice Breyer concluded that a purse that is attached to its owner "amount[s] to a kind of outer clothing which under the Court's cases would properly receive increased protection." *Ibid.*

This authority has left the lower courts in a condition of uncertainty. A majority of the state supreme courts to address the issue have followed Justice Breyer's approach, holding that a purse that is worn or carried by its owner may *not* be searched incident to the search of an automobile in which the owner is a passenger. A minority (including the court below) have rejected that view, holding that a purse being worn by its owner should be treated just like any other container located in the automobile. Because this conflict has been fueled by disagreement over the meaning of this Court's holdings, involves an issue of great practical importance that arises repeatedly across the Nation, implicates fundamental questions about the meaning of a search "of the person," and has led some courts to provide greater Fourth Amendment protection to persons who carry personal items in pockets and billfolds than to women who carry such items in purses, review by this Court is warranted.

I. The Decision Below Deepens An Acknowledged Conflict Among State Courts Of Last Resort On Whether The Search Of A Purse Worn Or Carried By A Passenger As Part Of A Vehicle Search Violates The Fourth Amendment

As numerous courts have recognized, there is a clear split in authority in the state courts on whether the Fourth Amendment permits the search of a purse carried or worn by an automobile passenger who is not herself subject to search. Although the court below held that *Houghton* authorizes this form of search, the majority of state supreme courts to address the issue have held that circumstances such as those here are of a fundamentally different character from those in *Houghton*. The decision below deepens this intractable divide.

1. The majority of state supreme courts to consider the issue presented here follow the concurring opinion in *Houghton* and find the passenger's physical possession of the purse decisive. They conclude that a purse attached to a passenger's person "amount[s] to a kind of 'outer clothing'" deserving of a heightened level of Fourth Amendment protection. 526 U.S. at 308 (Breyer, J., concurring) (citing *Terry* v. *Ohio*, 392 U.S. 1, 24 (1968)). Consistent with this Court's decisions in *Di Re*, *Ybarra*, *Terry*, and *Sibron*, they hold that, absent probable cause or articulable suspicion, a police officer's order that the passenger relinquish the purse and the subsequent search of the purse is an impermissible intrusion on the passenger's person that violates the Fourth Amendment.

In *State* v. *Boyd*, the Kansas Supreme Court unanimously held that where a passenger "in re-

sponse to [an] officer's order to leave her purse in the vehicle, puts the purse down and exits the vehicle, a subsequent search of the purse as part of a search of the vehicle violates the passenger's Fourth Amendment right against unreasonable search and seizure." 64 P.3d 419, 427 (Kan. 2003). Unlike *Houghton*, "where the purse was voluntarily left in the back seat unclaimed," the Kansas court determined that "[t]he heightened privacy interest and expectation" of a passenger in possession of her purse as she attempted to exit the vehicle outweighed the government's interest in conducting the search. *Ibid.* Observing that police could not have searched the passenger's purse had she not been forced to relinquish it upon exiting the vehicle, the court warned that "[t]he protection of the Fourth Amendment cannot be defined at the discretion of a law enforcement officer." *Ibid.* In reaching this conclusion, the court expressly rejected the contrary view of the South Dakota Supreme Court (which reached the same conclusion as the court below in this case). See *id.* at 425.

A unanimous North Dakota Supreme Court has likewise held that "the Fourth Amendment is violated when an officer directs that a purse be left in the vehicle and then proceeds to search the purse incident to the arrest of another passenger in the vehicle." *State* v. *Tognotti*, 663 N.W.2d 642, 650 (N.D. 2003). That court, drawing on Justice Breyer's concurring opinion in *Houghton*, concluded that "a purse is a special personal container and a search of it very nearly involves the same intrusion as the search of the person herself." *Id.* at 649. The court acknowledged that where a passenger voluntarily leaves a purse in the car law enforcement authorities may lawfully search it. But if an officer orders a passen-

ger to leave the purse in the car, the passenger's "Fourth Amendment rights against unreasonable search and seizure would preclude him from searching the purse." *Id.* at 650.

In *State* v. *Newsom*, 979 P.2d 100 (Idaho 1998), the Idaho Supreme Court also unanimously reached the same result. When Newsom, a passenger in a stopped car, began to exit the vehicle with her purse, police officers ordered her to leave the purse in the car and then searched the purse as part of their search of the car. *Id.* at 100-01. The Idaho Supreme Court concluded that the search violated the Fourth Amendment because, "[i]n these circumstances, the passenger's purse was entitled to as much privacy and freedom from search and seizure as the passenger herself." *Id.* at 102. The court held that the search "violated the passenger's right to be free from unreasonable search and seizure." *Id.* at 100, 102.

In addition to these holdings, intermediate appellate courts in several other states have held on essentially identical facts that a police officer may not order a passenger to leave her purse in the car when no probable cause or suspicion exists that would justify a search of the passenger. See, *e.g.*, *State* v. *Tanner*, 915 So. 2d 762, 764 (Fla. Dist. Ct. App. 2005); *State* v. *Nelson*, 948 P.2d 1314, 1316 (Wash. Ct. App. 1997); *McNeil* v. *State*, 656 So. 2d 1320, 1321 (Fla. Dist. Ct. App. 1995); *Commonwealth* v. *Stagliano*, 417 A.2d 627, 631 (Pa. Super. Ct. 1979). And two state supreme courts have concluded that the search of a passenger's purse, absent individualized suspicion with respect to the passenger, violates protections afforded by their respective state constitutions. See *State* v. *Parker*, 987 P.2d 73 (Wash. 1999) (reversing three consolidated cases) (police violate the state constitution when they command a

passenger to relinquish a personal item, including a purse or jacket, and leave it in a vehicle to subject it to search); *Commonwealth* v. *Shiflet*, 670 A.2d 128, 131 n.3 (Pa. 1995) (police may not search passenger's purse absent reason to believe the passenger is involved in criminal activity).

2. In contrast, the Ohio Supreme Court here joined the South Dakota Supreme Court in concluding that the Fourth Amendment does not prohibit an officer from ordering a passenger, not under any suspicion, to leave a purse in a vehicle so that it may be searched as part of the search of a vehicle. These courts give dispositive weight to the presence of the purse within the car at the moment the police obtain lawful authority for search; they regard a passenger's physical possession of the purse as irrelevant.

Invoking *Houghton* (App., *infra*, 1a), the court below summarily affirmed a lower court decision holding that "[t]he goals of *Belton* and *Houghton* would be thwarted by allowing a passenger such as Mercier to have the discretion to remove a purse." *Id.* at 16a-17a. As the dissenting Ohio justices noted, and as the majority did not deny, that decision cannot be reconciled with the holdings of the Kansas, North Dakota, and Idaho Supreme Courts.

The Supreme Court of South Dakota, in a 3-2 decision, has also held the Fourth Amendment does not prohibit the type of search at issue here. *State* v. *Steele*, 613 N.W.2d 825 (S.D. 2000). That court concluded that the rule of *Belton* permits an officer to direct a passenger to leave a purse in the car even though no lawful grounds exist to search the passenger. The court rejected the Idaho Supreme Court's contrary holding in *Newsom* as inconsistent with what it regarded as the bright line rule established

in *Belton*. 613 N.W.2d at 829. The South Dakota court reasoned that, since a container "did exist within the vehicle" at the point at which the justification for search of the vehicle was triggered, "*Belton* authorizes the search of that container. [The passenger] may not, by attempting to remove her purse, change the facts present to law enforcement at the time justification for the search was triggered." *Steele*, 613 N.W.2d at 828.

The dissenting justices in *Steele* rejected the majority's reliance on *Belton*. Unlike the passengers in *Belton*, Steele had not been arrested prior to the search of her purse. 613 N.W.2d at 830 (Amundson, J., dissenting). The dissenters chastised the majority for succumbing to the "phantom safety crutch" that the passenger's purse could have contained weapons or contraband. *Id.* at 832. They pointed out that, in all other contexts, the Fourth Amendment requires law enforcement personnel to be able to point to specific, articulable facts to justify the search of a person and her purse, adding that the record in the case before them failed to establish any such facts. *Ibid.* Contrary to the majority and in agreement with other state courts, the dissenters would have held that "[w]here a person maintains control over their personal property, such as Steele did when she attempted to leave the vehicle with her purse * * * a police officer is not allowed to search her person and property." *Ibid.* The majority's rule "blur[s] the constitutional rights of passengers in automobiles and subject[s] them and their property to searches and seizures solely on the basis that they were in the wrong place at the wrong time." *Ibid.*

3. As these conflicts between and within the state supreme courts demonstrate, there is considerable confusion over the Fourth Amendment protec-

tion afforded to a vehicle passenger in possession of a purse. The conflicting decisions on the scope of an automobile passenger's Fourth Amendment protections are not the product of distinguishable factual scenarios. They result from differing answers to the same, straightforward question: When a police officer orders a passenger to relinquish a purse that she is carrying or wearing, is the subsequent search of that purse analogous to a search of any other container found in the car, or is it deserving of the more heightened protection afforded to the passenger's person? The state supreme courts have staked out opposing positions on this fundamental issue of Fourth Amendment law. Review by this Court is necessary to clarify the Fourth Amendment rights of an automobile's occupants.

II. This Case Presents An Issue Of Substantial National Importance

The issue presented here is one of significant practical importance, for several reasons. *First*, as the conflict in the state courts graphically demonstrates, the issue is one that recurs with considerable frequency. The highest courts of seven states have now decided the question under the U.S. or their state Constitutions. The issue also has been addressed by appellate courts in several additional jurisdictions. And the situation presented in all of these cases – that of a passenger carrying a purse, who is not herself under suspicion but is riding in an automobile that is subject to search – is a common occurrence on the Nation's roads and highways that can be expected to arise repeatedly in the future. Until resolved by this Court, the conflict will cause considerable uncertainty in jurisdictions that have not yet addressed the issue and will result in a re-

gime in which an important constitutional question receives different answers in different states.

Second, the search of a purse, like a search of a man's billfold or pockets, implicates fundamentally important privacy interests. As the Court consistently has recognized, "[e]ven a limited search of the outer clothing * * * constitutes a severe, though brief, intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience." *Terry* v. *Ohio*, 392 U.S. 1, 24-25 (1968). It thus is clear that a suspicionless search of a man's pockets would constitute an impermissible search of "outer clothing." *Id.* at 28. The outcome would be no different if the man were the passenger in a car: the existence of probable cause to search a vehicle does not mean that a passenger in the vehicle "loses immunities from search of his person to which he would otherwise be entitled." *Di Re*, 332 U.S. at 587.

Like billfolds or pockets, purses contain personal items that are essential for the day-to-day activities of their owners. As Justice Breyer stated in his concurrence in *Houghton*, "[p]urses are special containers" (526 U.S. at 308); the search "of a closed purse or other bag carried [by a woman] on her person * * * is undoubtedly a severe violation of subjective expectations of privacy." *New Jersey* v. *T.L.O.*, 469 U.S. 325, 337-38 (1985). Items that men typically carry in their pockets – like wallets, cellular telephones, keys, and medication – are characteristically kept by women in a purse, which is "a uniquely gender-based container typically only possessed by women." George M. Dery III, *Improbable Cause: The Court's Purposeful Evasion of a Traditional Fourth Amendment Protection in Wyoming* v. *Houghton*, 50 Case W. Res. L. Rev. 547, 585 (2000). Indeed, sociologist Christena Nip-

pert-Eng, in a study of how individuals understand and achieve privacy, determined that "if anything constitutes an island of privacy in the United States, it is one's wallet and/or purse." Christena Nippert-Eng, *Privacy in the United States: Some Implications for Design*, Intl. J. of Design, Aug. 2007, at 1, 5. The Court accordingly has "disapproved * * * a container-based distinction between a man's pocket and a woman's pocketbook." *Houghton*, 526 U.S. at 310 (Stevens, Souter, Ginsburg, JJ., dissenting).[2]

For this reason, decisions like the one below lead to troubling and perverse results: personal items that men characteristically carry in their pockets or billfolds (like medical prescriptions or telephone numbers) are shielded from discovery in a suspicionless search, while the same items may be discovered when carried by a woman in her purse. The Ohio Supreme Court's rule therefore has consequences that are illogical, arbitrary, and fundamentally inequitable.

Third, the need for certainty is especially important in this area of the law. This Court has stated, in reference to the Fourth Amendment, that "a single, familiar standard is essential to guide police officers, who only have limited time and expertise to reflect on and balance the social and individual inter-

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[2] So far as societal expectations of privacy are concerned, a purse is quite different from other carriers such as knapsacks or briefcases that may contain personal items. Such carriers are usually not worn by passengers in a car; it is common experience that the driver of a car often will place passengers' briefcases, knapsacks, and other larger bags in the trunk or rear seat, but generally will not offer to place a woman's purse in the trunk, just as the driver will not ask a man if he would like to empty the contents of his pockets into the trunk.

ests involved in the specific circumstances they confront." *Dunaway* v. *New York*, 442 U.S. 200, 213 (1979). The disarray in the state courts has prevented law enforcement authorities across the Nation from understanding and adopting a clear set of unchallenged rules regarding the conduct of automobile searches, and the use of conflicting rules in neighboring jurisdictions regarding the search of purses will cause continuing confusion and uncertainty. See Michele D. Schultz, *New York* v. *Belton: A Man's Car is Not His Castle—Fourth Amendment Search and Seizure*, 9 Ohio N.U. L. Rev. 153, 153 (1982) (noting that it is "difficult for a police officer, untrained in interpreting complex court decisions, to determine the scope of his authority"). Resolution of the question presented here accordingly is necessary to help both courts and police officers understand the scope of police authority in this frequently occurring situation.

Fourth, resolution of the question presented here would allow the Court to provide additional guidance on what kinds of law enforcement actions constitute search "of the person," an issue that arises across a range of factual settings.[3] Answering that question is of particular importance because the decision below is in considerable tension with this Court's re-

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[3] For example, courts have often looked to *Houghton* for guidance when considering whether purses or other containers belonging to visitors may be searched as part of a search warrant for the premises. See, e.g., *United States* v. *Vogl*, 7 F. App'x 810 (10th Cir. 2001) (discussing government's argument that, under *Houghton*, "so long as the officers do not conduct a search of property contained in clothing worn by that person, the context, or place, where the property is found no longer matters"); *State* v. *Leiper*, 761 A.2d 458 (N.H. 2000); *State* v. *Reid*, 77 P.3d 1134 (Or. Ct. App. 2003).

peated recognition that searches of outer clothing are impermissible absent probable cause. See *Houghton*, 526 U.S. at 303. It is not at all apparent why law enforcement officials should be permitted to direct a woman who is not suspected of wrongdoing to leave her purse in an automobile to be searched, but may not instruct a passenger to leave his (or her) coat in the vehicle so that its pockets may be searched, or to remove his (or her) wallet from his (or her) pocket so that it may be searched. At best, the rule announced by the Ohio Supreme Court turns on illogical and analytically insupportable distinctions; at worst, it will cause considerable confusion about the scope of permissible searches of the person.

III. The Fourth Amendment Prohibits The Search Of A Purse Worn Or Carried By An Automobile Occupant Absent Probable Cause

The need for review here is especially acute because the decision below is wrong. The Ohio Supreme Court summarily upheld the search of petitioner's purse on the authority of *Houghton*. This was error. *Houghton* addressed the search of a purse "found at a considerable distance from its owner, who did not claim ownership until the officer discovered her identification while looking through it." 526 U.S. at 308 (Breyer, J., concurring). The Court accordingly held in that case that the Fourth Amendment permitted the search of a passenger's purse that had been *unclaimed and voluntarily left behind in the vehicle*. But as Justice Breyer explained, the Fourth Amendment analysis would differ if the passenger were wearing or holding the purse: "I can say that it would matter if a woman's purse, like a man's billfold, were attached to her person." *Ibid.*

The decision of the court below, however, rests on the assumption that these two scenarios are indistinguishable – that a purse worn or held by a passenger is equivalent to any container that is voluntarily left behind in an automobile prior to search. This conclusion is sharply inconsistent with this Court's Fourth Amendment jurisprudence.

1. The Fourth Amendment protects "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." A warrantless search violates the Fourth Amendment if it is unreasonable. See *United States* v. *Knights*, 534 U.S. 112, 118-19 (2001). "[T]he reasonableness of a search is determined 'by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.'" *Ibid.* (quoting *Houghton*, 526 U.S. at 300).

The decision in *Houghton* balanced the privacy interests of the passenger with the law enforcement interests of the state and found that, in the circumstances presented there, the scale tipped in favor of the latter. 526 U.S. at 303-07. But in circumstances such as those here, the balance tips the other way. Not only does the person carrying a purse demonstrate a heightened privacy interest, but the state's law enforcement interest is diminished where a passenger wears or carries a purse.

2. On the personal side of the equation, the degree of intrusion upon petitioner's privacy and dignity in this case was extreme. This Court and other courts consistently have recognized the heightened privacy interest an individual has in a purse she is wearing or carrying. As we have noted, the search

"of a closed purse or other bag carried on [one's] person * * * is undoubtedly a severe violation of subjective expectations of privacy." *T.L.O.*, 469 U.S. at 337-38. "[I]ndividuals carry purses or shoulder bags to hold objects they wish to have with them. Containers such as these, while appended to the body, are so closely associated with the person that they are identified with and included within the concept of one's person." *United States* v. *Graham*, 638 F.2d 1111, 1114 (7th Cir. 1981).[4] And it is clear that petitioner, unlike the defendant in *Houghton*, consistently demonstrated concern for the privacy of her purse. When police officers encountered petitioner, she was in possession of her purse, carrying it in her lap. App., *infra*, 3a-4a. She attempted to exit the vehicle with the purse in her possession until the officers prohibited her from doing so.

In light of this heightened interest in privacy, lower courts have acknowledged that purses worn or carried are entitled to the same Fourth Amendment protection as the person of the carrier. See, e.g., *United States* v. *Johnson*, 475 F.2d 977, 979 (D.C. Cir. 1973); *United States* v. *Teller*, 397 F.2d 494, 496-97 (7th Cir. 1968). Indeed, as Justice Breyer observed in *Houhgton*, a purse attached to one's person "amount[s] to a kind of 'outer clothing,' * * * which under this Court's cases would properly receive increased protection." 526 U.S. at 308 (Breyer, J., con-

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[4] Numerous jurisdictions have held that a purse is considered an extension of the person for Fourth Amendment purposes. See, e.g., *Hinkel* v. *Anchorage*, 618 P.2d 1069 (Alaska 1980); *People* v. *Inghamm*, 6 Cal.Rptr.2d 756, 758 (Cal. Ct. App. 1992); *Hawkins* v. *State* 300 S.E.2d 224, 225 (Ga. Ct. App. 1983); *State* v. *Wynne*, 552 N.W.2d 218, 220 (Minn. 1996); *State* v. *Andrews*, 549 N.W.2d 210, 214-17 (Wis. 1996).

curring) (citing *Terry* v. *Ohio*, 392 U.S. 1, 24 (1968)). And "'[e]ven a limited search of the outer clothing * * * constitutes a severe, though brief, intrusion upon cherished personal security, and it must surely be annoying, frightening, and perhaps humiliating experience.'" *Houghton*, 526 U.S. at 303 (quoting *Terry*, 392 U.S. at 24-25). Yet under the Ohio Supreme Court's rule, an individual who keeps her purse sealed, slung over her shoulder, and clutched under her arm must still yield to a police officer's command to relinquish it because she happened to travel in the same car as an individual under suspicion.

3. On the other side of the equation, recognizing the Fourth Amendment protection afforded to a passenger in a vehicle who is wearing a purse does not hinder any significant law enforcement interest. Requiring that an officer refrain from searching a purse in the physical possession of a passenger who is not suspected of wrongdoing and does not present a security threat does not raise practical concerns comparable to those considered in *Houghton*. See 526 U.S. at 305-06 (observing that requiring a police officer to inquire into the ownership of any container voluntarily *left behind* in a vehicle would produce a "bog of litigation * * * involving such questions as whether the officer should have believed a passenger's claim of ownership, [and] whether he should have inferred ownership from various objective factors"). Moreover, because petitioner was carrying her purse, no inquiry into the container's ownership that could have delayed search of the vehicle would have been necessary. And precluding the suspicionless search of a purse in such circumstances would not bar police officers from searching a passenger's purse when there *is* probable cause implicat-

ing the passenger or the purse in wrongdoing, or from conducting a minimal search under *Terry* when there is reasonable apprehension of danger. To the contrary, this approach would simply require police officers to apply the same familiar Fourth Amendment standards to automobile passengers that they employ in all other contexts.

4. Balancing petitioner's heightened expectation of privacy against the attenuated law enforcement interest present in these circumstances, the search of petitioner's purse was unreasonable and hence in violation of the Fourth Amendment. Police officers had no justifiable reason to search petitioner's person. She was not under arrest. She was not viewed as a security threat. And she was free from suspicion of wrongdoing. As an innocent vehicle passenger, petitioner was not subject to search. See *Di Re*, 332 U.S at 593.

Had petitioner been allowed to exit the vehicle with her purse as she attempted to do, there is no doubt that police officers would have lacked authority to search the purse. See *Boyd*, 64 P.3d at 427. The decision of the court below, then, diminished petitioner's Fourth Amendment protections solely because she was present in an automobile. But this Court has repeatedly rejected such a result. "The word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears." *Coolidge* v. *New Hampshire*, 403 U.S. 443, 461 (1971). Indeed, the "basic, pervasive" and "necessary" character of automobile travel would make any such result intolerable:

> Were the individual subject to unfettered governmental intrusion every time he entered an automobile, the

> security guaranteed by the Fourth Amendment would be seriously circumscribed. As *Terry* v. *Ohio*, *supra*, recognized, people are not shorn of all Fourth Amendment protection when they step from their homes onto the public sidewalks. Nor are they shorn of those interests when they step from the sidewalks into their automobiles.

Delaware v. *Prouse*, 440 U.S. 648, 662-63 (1979). The decision of the Ohio Supreme Court cannot be reconciled with that view.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JUNE 2008

APPENDICES

APPENDIX A

Supreme Court of Ohio

THE STATE OF OHIO, APPELLEE, V. MERCIER, APPELLANT.

Court Of Appeals' Judgment Affirmed On The Authority Of Wyoming V. Houghton.

(No. 2007-0980 — Submitted March 12, 2008 — Decided April 2, 2008.)

Appeal From The Court Of Appeals For Hamilton County,
No. C-060490, 2007-Ohio-2017.

{¶ 1} The judgment of the court of appeals is affirmed on the authority of *Wyoming v. Houghton* (1999), 526 U.S. 295, 119 S.Ct. 1297, 143 L.Ed.2d 408.

MOYER, C.J., and LUNDBERG STRATTON, O'CONNOR, O'DONNELL, and CUPP, JJ., concur.

PFEIFER and LANZINGER, JJ., dissent.

LANZINGER, J., dissenting.

{¶ 2} The majority sees this case as straightforward and easily affirmed without opinion on the basis of *Wyoming v. Houghton* (1999), 526 U.S. 295, 119 S.Ct. 1297, 143 L.Ed.2d 408. However, I believe that significant factual differences exist between the two that prevent such a succinct resolution. Not only have the supreme courts of other states held that *Houghton* is not controlling in circumstances similar

to those before us, but Justice Breyer's concurrence in *Houghton* itself suggests that it does not decisively answer the question before us today.

{¶ 3} In *Houghton*, the United States Supreme Court was presented with the question of whether, when there is probable cause to search an automobile for contraband, police may search a passenger's purse found in the back seat of a vehicle. The court, in a six-to-three decision, held that "police officers with probable cause to search a car may inspect passengers' belongings found in the car that are capable of concealing the object of the search." Id. at 307, 119 S.Ct. 1297, 143 L.Ed.2d 408.

{¶ 4} Unlike in the case before us, in *Houghton*, the purse was found in the back seat of the car and was not, at the time of the stop, directly connected to its owner. Justice Breyer highlighted this point in his concurring opinion, writing that had the purse been carried by, or otherwise attached to, its owner, the result might have been different. He stated that "the container here at issue, a woman's purse, was found at a considerable distance from its owner, who did not claim ownership until the officer discovered her identification while looking through it. Purses are special containers. They are repositories of especially personal items that people generally like to keep with them at all times. So I am tempted to say that a search of a purse involves an intrusion so similar to a search of one's person that the same rule should govern both. However, given this Court's prior cases, I cannot argue that the fact that the container was a purse *automatically* makes a legal difference, for the Court has warned against trying to make that kind of distinction. * * * But I can say that it would matter if a woman's purse, like a man's billfold, were attached to her person. It might then

amount to a kind of 'outer clothing.'" (Emphasis sic.) Id. at 308, 119 S.Ct. 1297, 143 L.Ed.2d 408, quoting *Terry v. Ohio* (1968), 392 U.S. 1, 24, 88 S.Ct. 1868, 20 L.Ed.2d 889 (Breyer, J., concurring).

{¶ 5} If, as Justice Breyer suggests, a purse that is in the possession of its owner should not be considered a container, but instead should be considered an item in which a person has a heightened expectation of privacy, the result mandated by United States Supreme Court precedent is decidedly different from the one the majority reaches today. In *United States v. Di Re* (1948), 332 U.S. 581, 587, 68 S.Ct. 222, 92 L.Ed. 210, the court held that simply being a passenger in a car is not enough to justify a complete search of a person. This principle was reaffirmed in *Houghton*, 526 U.S. at 303, 119 S.Ct. 1297, 143 L.Ed.2d 408.

{¶ 6} Thus, the question that we must answer in this case and the question that the majority fails to address is: Was the search of Laura Mercier's purse more analogous to a search of a container or a search of her person? Based on the facts and circumstances of this case, I would answer that the search of Mercier' s purse constituted an impermissible search of her person.

{¶ 7} Mercier was a passenger in a car driven by Charles Hagedorn when he was stopped by the police. Immediately before the stop, Hagedorn had sold marijuana to a police informant. The sale had occurred outside of the car. After completing the sale and returning to the car, Hagedorn had driven off with Mercier. He was then stopped by the police.

{¶ 8} During the stop, the police recovered rolling papers, the money used by the informant to purchase the drugs, and Hagedorn's remaining supply of mari-

juana, which he voluntarily turned over when the officers told him that they smelled marijuana. After arresting Hagedorn, the police ordered Mercier, who was holding her purse on her lap, to get out of the vehicle and leave her purse behind.

{¶ 9} Although Mercier was ordered out of the vehicle, one of the police officers on the scene testified that he did not consider her to be a suspect in any crime. Nor was she viewed as a security threat, for the officer also testified that he had no memory of patting her down or otherwise checking her for weapons. It is undisputed that when she was ordered out of the vehicle, Mercier was not under arrest, and she was free from suspicion of wrongdoing. Under the holding of *Di Re*, as an innocent vehicle passenger, Mercier was not subject to search. *Di Re*, 332 U.S. at 593, 68 S.Ct. 222, 92 L.Ed. 210. Her purse was in her possession, or would have been but for intervention by the officers. Thus, the facts of this case are decidedly different from those of *Houghton*, in which the purse was not in the possession of its owner but was found in the back seat of the vehicle.

{¶ 10} Although we have not yet considered, in light of *Houghton*, whether a purse when being worn or held constitutes part of the person or is instead a separate container, several other states have addressed this issue. The Kansas Supreme Court, relying in part on Justice Breyer's concurrence in *Houghton*, held that unless there is an arrest or probable cause sufficient to support a search, a woman's purse in her possession or under her control constitutes part of her person and is not subject to search. *State v. Boyd* (2003), 275 Kan. 271, 282, 64 P.3d 419. Similarly, the North Dakota Supreme Court also considered Houghton when it held, "A purse, like a billfold,

is such a personal item that it logically carries for its owner a heightened expectation of privacy, much like the clothing the person is wearing. We are, therefore, persuaded * * * that the Fourth Amendment is violated when an officer directs that a purse be left in the vehicle and then proceeds to search the purse incident to the arrest of another passenger in the vehicle." *State v. Tognotti*, 2003 ND 99, 663 N.W.2d 642, ¶ 20. Additionally, although decided before *Houghton*, *State v. Newsom* (1998), 132 Idaho 698, 700, 979 P.2d 100, held that when police order a passenger to leave a purse in a vehicle so that it may be searched, that search violates the passenger's right to be free from unreasonable search and seizure.

{¶ 11} Despite the fact that a majority of state supreme courts that have considered the issue have held that a person has a heightened expectation of privacy in a purse being carried or worn, that conclusion is not uniform. In a three-to-two decision, the South Dakota Supreme Court held that police may order a woman to leave her purse in a vehicle and that officers have the same authority to search the purse as they would other containers found in the vehicle. *State v. Steele*, 2000 SD 78, 613 N.W.2d 825, ¶ 19. The dissent, however, argued, "To disallow the suppression of this evidence * * * would be to blur the constitutional rights of passengers in automobiles and subject them and their property to searches and seizures solely on the basis that they were in the wrong place at the wrong time." Id. at ¶ 29.

{¶ 12} Rather than accept the view of the South Dakota Supreme Court, I am persuaded that a woman (or man for that matter) in possession of a purse, either worn or carried, has a reasonable expectation of privacy in its contents, and I reject the idea that a purse is nothing more than a simple con-

tainer, subject to search at will. I would hold that unless probable cause exists for an arrest of the person, law enforcement officers may not instruct an innocent passenger to leave a purse behind in a vehicle so that it may be searched.

{¶ 13} This holding would not limit law enforcement officers' ability to search the person, including a purse, subject to lawful arrest. The rule that police may search a person when probable cause for arrest exists remains unchanged. Officers may also still exercise their authority under *Terry v. Ohio* (1968), 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889, to conduct a minimally intrusive search for weapons to protect their own safety when they have a reasonable apprehension of danger.

{¶ 14} In this case, Mercier was not under arrest and was not suspected of any criminal activity. Without any reasonable suspicion that Mercier herself was involved in Hagedorn's criminal activity, the officers did not have probable cause to arrest and search her. Nor did she pose a threat to officer safety, as is highlighted by the fact that the officers could not recall specifically whether she had been frisked or otherwise checked for weapons.

{¶ 15} Our Fourth Amendment jurisprudence is fact-intensive as to the circumstances of reasonableness. Given these facts, I would hold that because the search of her purse violated Mercier's Fourth Amendment rights, any evidence obtained as a result must be suppressed. I therefore dissent and would reverse the judgment of the court of appeals.

PFEIFER, J., concurs in the foregoing opinion.

APPENDIX B

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE OF OHIO,
Plaintiff-Appellee,
vs.
LAURA MERCIER,
Defendant-Appellant.

APPEAL NO. C-060490
TRIAL NO. B-0507049B
DECISION.

Criminal Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: April 27, 2007

WINKLER, Judge.

{¶ 1} Defendant-appellant Laura Mercier was indicted for and pleaded not guilty to aggravated drug possession, in violation of R.C. 2925.11(A). She filed a motion to suppress evidence, which the trial court denied. Mercier changed her plea to no contest, and the trial court found her guilty. The court sentenced Mercier to three years' community control, suspended her driver's license for a year, and imposed a $250 fine. Mercier's sentence was stayed pending appeal.

{¶ 2} Mercier's sole assignment of error alleges that the trial cout erred in denying her motion to suppress evidence.

{¶ 3} At the suppression hearing, Madeira Police Lieutenant Chris Zumbiel testified that he had been investigating Charles Hagedorn for drug trafficking. On July 17, 2005, at about 6:40 p.m., Mercier was a passenger in Hagedorn's car. Hagedorn exited from his car, approached the vehicle of a confidential informant, and sold the informant about a half pound of marijuana. Mercier stayed in Hagedorn's car while the sale took place. Hagedorn returned to his car and drove away with Mercier still in the front passenger's seat.

{¶ 4} Police stopped Hagedorn's car approximately one to two minutes after the sale. Lieutenant Zumbiel questioned Hagedorn, who admitted that there was marijuana in his car. Hagedorn opened a middle console and handed Zumbiel marijuana. Police removed Hagedorn from the car and patted him down, recovering the buy money and some rolling papers. Hagedorn was then placed in a police cruiser.

{¶ 5} Zumbiel then approached Mercier and removed her from Hagedorn's car. Zumbiel testified that "at that point [Mercier's] purse was left in the front seat. [Mercier] was placed in another cruiser." Zumbiel searched Mercier's purse. He found an Advil bottle, which he opened. The bottle contained four Adderall pills, a form of amphetamine. Zumbiel arrested Mercier. He read Mercier her *Miranda* rights, which she v aived. Mercier told Zumbiel that a friend had given her the drugs, which she used to help her stay awake.

{¶ 6} Zumbiel testified that Mercier was removed from Hagedorn's car because police were going to seize the vehicle for possible forfeiture. Zumbiel stated that Mercier's purse was searched because police were doing an "impound inventory" of the car, and pursuant to Madeira police procedures "all containers, everything [was to be] searched and inventoried." Zumbiel explained that it was standard written procedure of Madeira police to remove and inventory all items from a vehicle that was going to be impounded.

{¶ 7} Zumbiel also testified that Mercier's purse was searched because police thought there was a possibility that it contained illegal drugs due to Mercier's proximity to Hagedorn's drug deal. In addition, Zumbiel stated that, to ensure the safety of the police officers, he would have searched the purse for a weapon before he returned it to Mercier. Zumbiel testified that he did not remember patting Mercier down. He stated that he typically called for a female officer to pat down female suspects. Zumbiel stated that another officer on the scene could have checked Mercier for weapons. Zumbiel testifed that Mercier was already in a police cruiser when he searched her purse.

{¶ 8} On cross-examination, Zumbiel testified that Mercier was not a suspect when police stopped Hagedorn's car. He also testified that when he approached Hagedorn's car, Mercier had her purse "on her person" and that Mercier left her purse on the front seat only because Zumbiel had asked her to exit from the car and leave the purse behind.

{¶ 9} Mercier argued that because she had her purse sitting on her lap when police stopped Hagedorn's car, it was part of her person, and, therefore,

police had to show probable cause to search it. The state argued that police were justified in searching the purse because it was part of the inventory of the car, they had probable cause to believe that it contained illegal drugs due to Mercier's proximity to Hagedorn's drug sale, and they had the right to search the purse for weapons to ensure their safety.

{¶ 10} On appeal, Mercier raises two issues for our review. She first argues that a purse worn or carried by a passenger in a car cannot be searched if the passenger is not subject to search. She also argues that, even if her purse was subject to a search, police exceeded the permissible scope of the search by opening the Advil bottle.

{¶ 11} In defining the scope of a search incident to an arrest, the United States Supreme Court held in *Chimel v. California*[1] that a police officer making a lawful custodial arrest may search the arrestee and the area within the arrestee's immediate control to ensure that no weapons are present and to prevent the destruction or concealment of evidence. The Court applied the *Chimel* rule to automobile searches in *New York v. Belton*[2] and held that a police officer making a lawful custodial arrest of the driver of an automobile may search the passenger compartment of the car and any containers found there, whether the containers are open or closed. The Court defined "container" as "any object capable of holding another object," including "closed or open glove compartments, consoles, or other receptacles located anywhere within the passenger compartment, as well as luggage, boxes, bags, clothing, and

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[1] (1969), 395 U.S. 752, 89 S.Ct. 2034.

[2] (1981), 453 U.S. 454, 101 S.Ct. 2860.

the like."[3] The purposes of the *Belton* rule are to protect police officers and preserve evidence.[4] The *Belton* Court did not limit the scope of the permissible search to containers that might conceal weapons or evidence. The Court, stating that a "single familiar standard" was "essential to guide police officers," drew a bright-line rule that allows police to search all containers found within the passenger compartment of the vehicle.[5] A search of the entire passenger compartment is justified because it "generally, even if not inevitably" is within the arrestee's immediate control.[6] If the passenger compartment is within the arrestee's reach, so are any containers found there.[7] "The authority to search * * * incident to a lawful custodial arrest, while based upon the need to disarm and discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found[.]"[8] A police officer's actual fear or lack of fear is not to be a consideration in determining whether the search was lawful.[9]

{¶ 12} In *State v. Murrell*,[10] the Ohio Supreme Court adopted the *Belton* rule in addressing the pro-

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[3] See id.

[4] See id.

[5] See id.

[6] See id.

[7] See id.

[8] See id., citing *United States v. Robinson* (1973), 414 U.S. 218, 94 S.Ct. 467

[9] See id.; *State v. Reed*, 7th Dist. No. 05HA575, 2005-Ohio-6791.

[10] 94 Ohio St.3d 489, 2002-Ohio-1483, 764 N.E.2d 986.

tection against unreasonable searches contained in Section 14, Article I of the Ohio Constitution, stating, "The *Belton* court reached a calculated conclusion that a search of the motor vehicle incident to arrest in this situtation is a reasonable one, justified principally by concerns for officer safety and preserving evidence, and the advantages of having a bright-line rule in such situations. * * * Consistent with *Belton*, we hold that when a police officer has made a lawful custodial arrest of the occupant of an automobile, the officer may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." Therefore, the protection afforded Mercier in this case against unreasonable searches and seizures found in Section 14, Article I of the Ohio Constitution was coextensive with that found in the Fourth Amendment to the United States Constitution.[11]

{¶ 13} In *Wyoming v. Houghton*,[12] the United States Supreme Court held that police officers with probable cause to conduct a warrantless search of an automobile for contraband could search a purse left by a passenger on the back seat of the car. Sandra Houghton was a passenger in a car that was stopped by police for speeding and displaying a faulty brake light. The officer saw a hypodermic syringe in the driver's shirt pocket. The driver admitted that he used the the syringe to "take drugs." Based on the driver's admission, the officer searched the car for contraband. The search included Houghton's purse, which was on the back seat of the car. Houghton's

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[11] See id.

[12] (1999), 526 U.S. 295, 119 S.Ct. 1297.

purse contained methamphetamines and drug paraphernalia.

{¶ 14} The *Houghton* Court held that police officers with probable cause to search a car may search a passenger's belongings found in the car that could conceal the object of the search.[13] The Court determined that passengers, as well as drivers, "possess a reduced expectation of privacy" in regard to items that they transport in automobiles.[14] The heightened protection afforded to a passenger against a search of his or her person does not apply to a search of the passenger's personal property found inside an automobile.[15] The important issue is the location of the container within the automobile, not the ownership of the container.[16] The *Houghton* Court reasoned that three factors favored allowing the search of a passenger's belongings: the risk of losing evidence due to the mobility of an automobile, the possibility that a passenger may be engaged with the driver in a common criminal endeavor and have a personal interest in concealing contraband, and the chance that a passenger may become an "unwitting accomplice" to the driver's crime if the driver has sought to hide evidence in a passenger's belongings.[17]

{¶ 15} Justice Breyer stated in his concurring opinion in *Houghton* that it was important that Houghton had left her purse in the back seat of the car, a "considerable distance" away from her, and

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[13] See id.

[14] See id., citing *Cardwell v. Lewis* (1974), 417 U.S. 583, 94 S.Ct. 2464.

[15] See id.

[16] See id.

[17] See id.

that she did not claim ownership of the purse until the officer found her identification inside.[18] Justice Breyer viewed a woman's purse as a "special container" that is a repository "of especially personal items that people generally like to keep with them at all times."[19] If a woman's purse is "attached to her person," Justice Breyer reasoned, it "might then amount to a kind of 'outer clothing'" that would "properly receive increased protection."[20]

{¶ 16} Mercier argues, citing *Houghton*, that because her purse was in her lap when Hagedorn's car was stopped, it was "attached to her person," and, therefore, it could not have been searched in the absence of particularized probable cause to search her person. Mercier argues that there was no probable cause to search her purse because she was not suspected of any criminal activity, and police had no reason to believe that she was armed. Further, Mercier argues that Zumbiel could not have created a right to search her purse by ordering her to leave it in the car.[21]

{¶ 17} In *Belton*, the Court held that when the driver of a car is arrested, the area within his immediate control includes the passenger compartment of the car and any containers found there.[22] The *Belton* Court defined container as "any object capable of

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[18] See id. (Breyer, J., concurring).

[19] See id.

[20] See id.

[21] See *State v. Tognotti* (N.D.2003), 663 N.W.2d 642; *State v. Boyd* (2003), 275 Kan. 271, 64 P.3d 419; *State v. Newsom* (1998), 132 Idaho 693, 979 P.2d 100; *State v. Seitz* (1997), 86 Wash.App. 865, 941 P.2d 5.

[22] See *New York v. Belton*, supra.

holding another object."[23] Mercier's purse, in the front seat of the car and inches away from Hagedorn, fit the *Belton* definition. The purposes of the *Belton* rule are to protect police officers and preserve evidence. If Mercier had been allowed to remove her purse prior to the search of Hagedorn's car, weapons or contraband could have been hidden from police, and the purposes of the *Belton* rule would have been nullified.[24] If the right of police to search a passenger's purse depended upon its location in the car, the bright-line rule that the *Belton* Court sought to establish to "guide police officers" would be blurred.[25] Would police be permitted to search a purse that was on a passenger's lap, over her shoulder, between her feet, on the floor near her feet, hanging from the back of her seat, or in some other location? Answering these fact-specific questions would require "precisely the sort of ad hoc determinations on the part of officers in the field and reviewing courts that *Belton* sought to avoid."[26] We do not believe that a passenger should be able to thwart a search by grabbing her purse and holding it when a car is stopped by police. In our view, the *Belton* rule did not permit Mercier to alter the facts presented to police at the time the search was triggered by attempting to remove her purse.[27]

{¶ 18} In *Houghton*, the Court pointed out that passengers have a reduced expectation of privacy in

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[23] See id.

[24] See *State v. Steele* (S.D.2000), 613 N.W.2d 825.

[25] See id.

[26] See *Thornton v. United States* (2004), 541 U.S. 615, 124 S.Ct. 2127.

[27] See *State v. Steele*, supra.

regard to personal property transported in an automobile. The *Houghton* Court emphasized that the location of the property in the automobile is the important factor and not the ownership of the property. We find no reason to exempt Mercier's purse from this rule. Further, the *Houghton* factors that favor allowing a search of a passenger's belongings—the risk of losing evidence due to the mobility of an automobile, the possibility of a common criminal enterprise involving the driver and his passenger, and the chance that a passenger might become an "unwitting accomplice" to the driver's crime—certainly applied to Mercier's purse. Police knew that Hagedorn had conducted a drug deal, that Mercier had waited in the car during the deal, that Mercier and her purse were in the front seat of the car inches away from Hagedorn just minutes after the deal, and that Hagedorn had more drugs hidden in the car's console. It was not a stretch for police to believe that Mercier's purse might have contained contraband or evidence. As the Ohio Supreme Court pointed out in *State v. Moore*,[28] "marijuana and other narcotics are easily and quickly hidden or destroyed." The goals of *Belton* and *Houghton* would be thwarted by allowing a passenger such as Mercier to have the discretion to remove a purse, a container large enough to hold weapons or contraband, just prior to a search.[29]

{¶ 19} We hold that the search of Mercier's purse was lawful and proper. Because Zumbiel had a legal right to search Mercier's purse, he also had a right to ensure that the purse was not removed from the authorized search area by requesting that she leave the

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[28] 90 Ohio St.3d 47, 2000-Ohio-10, 734 N.E.2d 804.

[29] See id.

purse in the car. Further, we hold that the Advil bottle fell within the *Belton-Houghton* definition of a container that might have held contraband, and, therefore, that Zumbiel was justified in opening it. The assignment of error is overruled, and the judgment of the trial court is affirmed.

Judgment affirmed.

CUNNINGHAM, P.J., and DINKELACKER, J., concur.

RALPH WINKLER, retired, from the First Appellate District, sitting by assignment.

APPENDIX C

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

State Of Ohio
Plaintiff
vs
Laura E. Mercier
Defendant

Case B05-07049
Judge Burke

Entry Overruling
Motion To Suppress

This cause came on to be heard on the defendant's motion to suppress the evidence.

The Court, after testimony and argument of counsel, finds said motion not to be well taken, and the same is hereby overruled.

To all of which the defendant excepts.

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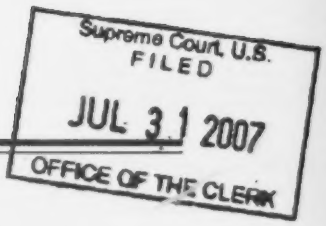
(3)

No. 08-17



In The

Supreme Court of the United States

LAURA MERCIER,

Petitioner,

v.

STATE OF OHIO,

Respondent.

On Petition for Writ of Certiorari to The Supreme Court of Ohio

BRIEF IN OPPOSITION

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QUESTION PRESENTED

This Court's decision in *Wyoming v. Houghton* allows for the search of a passengers purse if officers have probable cause to search the automobile. Mercier was the passenger in a car when the driver sold undercover officers a pound of marijuana immediately before the car was stopped and searched. Does *Houghton* allow Mercier to remove a container from the scene of a valid automobile search?

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OPINIONS BELOW

The opinion of the Supreme Court of Ohio is reported at 117 Ohio St.3d 1253, 885 N.E.2d 942, 2008-Ohio-1429. The unpublished opinion of the Court of Appeals, First Appellate District, Ohio can be found at the Ohio Supreme Court's website http://www.sconet.state.oh.us/rod/newpdf/default.asp. The citation is 2007-Ohio-2017. The opinion is also available through Westlaw at 2007 WL 1225858. The Hamilton Co. Ohio, Court of Common Pleas order denying the motion to suppress is unreported.

JURISDICTION

Mercier claims jurisdiction under 28 U.S.C. §1257.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

Mercier argues that a purse being held by a passenger is protected from search as part of the

passenger's "outer clothing"during an otherwise valid automobile search. She bases this contention on Justice Breyer's concurrence in *Wyoming v. Houghton*, 526 U.S. 295 (1999). But this argument is flawed for two reasons.

First, Justice Breyer's concurring opinion is just that – a concurring opinion. The opinion of the Court in *Houghton* makes no such distinction about where the purse is located. In fact, the majority's opinion rejects such artificial tests based on purported ownership of the purse. Instead, the majority opinion adopts a bright-line rule that is easily understood and applied by law enforcement in the field.

Secondly, even Justice Breyer's concurrence does not necessarily mandate the rule proposed by Mercier. Justice Breyer qualified the issue by saying that the location of the purse does not "automatically" make a legal difference. He then continued to note that the purse *might* be entitled to additional protections. From this "might," Mercier claims the argument is decided in her favor.

A more reasonable interpretation is the one adopted by the Ohio Supreme Court. Namely, that the majority opinion in *Houghton* has decided the issue. This court should decline jurisdiction and let *Houghton* stand.

Procedural Background:

The Hamilton County Grand Jury charged Laura Mercier, with Aggravated Drug Possession. Mercier filed a motion to suppress evidence of drugs found in

her purse. The motion was overruled by the trial court.

Mercier subsequently pled no contest to the offense. The trial court found her guilty and sentenced her to three years of community control, suspended her driver's license for a year, and levied a $250 fine. Mercier's sentence was stayed pending her appeal

The Ohio First District Court of Appeals reviewed Mercier's claim that her motion to suppress should have been granted. The First District rejected that claim.

Mercier then asked this The Ohio Supreme Court to exercise its discretion and review that decision. It did. In a 5-2 decision the Ohio Supreme Court summarily affirmed the decision below. The majority's opinion states that this Court's opinion in *Wyoming v. Houghton*, 526 U.S. 295 (1999), mandated its decision.

Factual Background:

In July of 2005 Laura Mercier was a passenger in a car with Charles Hagedorn, her co-defendant, as he went to sell a half pound of marijuana. Once they arrived at the parking lot where the deal was to take place, Hagedorn pulled in next to the buyer's car. Hagedorn then got out and went around to the passenger's side of his car. There he completed the sale through the driver's side window of the buyer's car. All the time, Mercier remained in the car while a drug transaction was taking place a couple feet away from her.

But unfortunately for the pair, the buyer was a confidential informant. He was wearing a wire and police officers were listening and recording the conversation. After completing the sale, Hagedorn got back in his car and drove away. Approximately one to two minutes later, police pulled over Hagedorn's car, with Mercier still in the passenger seat.

When questioned, Hagedorn admitted to Lt. Chris Zumbiel that there was still some marijuana in his vehicle, even after the sale. Hagedorn even handed some marijuana to the officer at that point. Lt. Zumbiel removed Hagedorn from the vehicle, placed him under arrest and secured him in the back of a police cruiser.

After arresting Hagedorn, the police approached Mercier, who had been in the car throughout the investigation, stop, and arrest. Because the police were going to seize Hagedorn's car based upon the felony drug sale, they asked Mercier to step out of the car as well. When she exited, Lt. Zumbiel told her to leave the purse in the car. Zumbiel then looked in the purse during his search of Hagedorn's car. That search recovered four Adderall pills that form the basis of Mercier's charge.

While testifying, Lt. Zumbiel stated that he searched the purse, in part, because Mercier had been in the vehicle at the time of the drug transaction and in close proximity to the location of the drugs in Hagedorn's car. Furthermore, in deciding to search Mercier's purse, the officer considered the fact that Mercier was in the back of the police cruiser, had been and was going to continue to be in close proximity to

himself and other officers, and was going to be given back her purse. Accordingly, he decided to search the purse for the safety of the officers, in addition to the previously articulated reasons.

REASONS FOR DENYING WRIT

Mercier argues that the evidence discovered in the search of her purse should have been suppressed. She contends that while a passenger's personal belongings in the car may be searched incident to the arrest of the driver, a passenger's purse may not be. She bases her argument on the theory that a women's purse is a part of her person or clothing rather than a container.

There are at least three reasons for this Court to reject Mercier's argument. First, such a holding would run counter to the rationale behind *New York v. Belton* and *Wyoming v. Houghton*, namely this Court's expressed need for a bright-line rule for police officers in the field to follow. Secondly, a purse is a container that can easily conceal the object of a search, such as a weapon or contraband, rather than a part of the passenger's person. Finally, as a public policy matter, allowing the passenger to take an item out of the search area effectively guts the authority granted to officers in *New York v. Belton*.

History of Search Incident to Arrest

In a long line of Fourth Amendment case law, including *New York v. Belton*, the this Court addressed the proper scope of a search of an automobile incident to the arrest of its occupants. The precedent set by the Court illustrates the Court's preference for a bright-

line rule concerning acceptable automobile searches under the Fourth Amendment. The scope of a search incident to arrest descends from the Court's decision in *California v. Chimel*, where it held that officers may search the area surrounding a defendant "from within which he might have obtained a weapon or something that could have been used as evidence against him.[1] The *Chimel* court recognized that officer safety and preservation of evidence provided "ample justification" for officers to extend their search beyond the person of the defendant, noting "[a] gun on the table or in a drawer in front of one who is arrested can be as dangerous to the arresting officers as one concealed in the clothing."[2]

***New York v. Belton* and the Need for a Bright-Line Rule**

The Court then extended the provisions of *Chimel* to automobiles in *New York v. Belton*. In *Belton*, the Court realized that "[t]he protection of the Fourth and Fourteenth Amendments 'can only be realized if the police are acting under a set of rules which, in most instances, makes it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement'."[3]

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[1] *Chimel v. California*, 395 U.S. 752, 768, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969).

[2] *Id.* at 762-763.

[3] *New York v. Belton*, 453 U.S. 454, 458, 101 S.Ct. 2860, 2863, 69 L.Ed.2d 768 (1981) quoting, LaFave, "Case-By-Case Adjudication"

The Court recognized that the

> Fourth Amendment doctrine, given force and effect by the exclusionary rule, is primarily intended to regulate the police in their day-to-day activities and thus ought to be expressed in terms that are readily applicable by the police in the context of the law enforcement activities in which they are necessarily engaged. A highly sophisticated set of rules, qualified by all sorts of ifs, ands, and buts and requiring the drawing of subtle nuances and hairline distinctions, may be the sort of heady stuff upon which the facile minds of lawyers and judges eagerly feed, but they may be 'literally impossible of application by the officer in the field'.[4]

In short, what is needed is "[a] single, familiar standard...to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront."[5] It is axiomatic that "[w]hen a person cannot know how a court will apply a settled principle to a recurring factual situation, that person cannot know the scope of his

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Versus "Standardized Procedures": The Robinson Dilemma, 1974 S.Ct.Rev. 127, 142.

[4] *Id.*, quoting, LaFave, "Case-By-Case Adjudication" Versus "Standardized Procedures": The Robinson Dilemma, 1974 S.Ct.Rev. 127, 141.

[5] *Id.*, quoting, *Dunaway v. New York*, 442 U.S. 200, 213-214, 99 S.Ct. 2248, 2256-2257, 60 L.Ed.2d 824 (1979).

constitutional protection, nor can a policeman know the scope of his authority."[6]

With the need for a single, familiar standard in mind, the Court in *Belton* held that when there is a lawful custodial arrest of the occupant of an automobile, the police officer may search the passenger compartment of that automobile. The Court expounded further, stating that prior case law "suggest[s] the generalization that articles inside the relatively narrow compass of the passenger compartment of an automobile are in fact generally, even if not inevitably, within 'the area into which an arrestee might reach in order to grab a weapon or evidentiary ite[m]'."[7] It follows from this conclusion that the police may also examine the contents of any containers found within the passenger compartment, for if the passenger compartment is within reach of the arrestee, so also will any containers in it be within his reach.[8]

The Court, in an accompanying footnote, defined container to include "closed or open glove compartments, consoles, or other receptacles located anywhere within the passenger compartment, as well

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[6] *Id.* at 460, 101 S.Ct., at 2864.

[7] *Id.*, quoting, *Chimel v. California*, 395 U.S. 752, 763, 89 S.Ct. 2034, 2040.

[8] *Id.*; See Also *United States v. Ross*, 456 U.S. 798, 102 S.Ct. 2157, 72 L.E.2d 572 (1982).

as luggage, boxes, bags, clothing, and the like."[9] The Court reiterated its position in *Knowles v. Iowa*, stating "[t]he authority to conduct a full field search as incident to an arrest was a bright-line rule which was based on the concern for officer safety and the destruction of evidence, but which did not depend in every case upon the existence of either concern."[10]

The *Belton* bright-line rule, and exception to the warrant requirement, was adopted by the Ohio Supreme Court in *State v. Murrell*.[11] In *Murrell*, the Ohio Supreme Court discussed this Court's reasoning and noted that "[i]t follows [from Chimel] that the police may also examine the contents of any container found within the passenger compartment, for if the passenger compartment is within reach of the arrestee, so also will containers in it be within his reach,***Such a container may, of course, be searched whether it is open or closed, since the justification for the search is not that the arrestee has no privacy interest in the container, but that the lawful custodial arrest justifies the infringement of any privacy interest the arrestee may have."

Moreover, the Ohio Supreme Court pointed out that the "*Belton* court **purposely** determined to craft a bright-line rule...", and that it must be acknowledged that there are "advantages of having a bright-line rule

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[9] *Id.* at 460-461, 101 S.Ct. at 2864.

[10] *Knowles v. Iowa*, 525 U.S. 113, 118, 119 S.Ct. 484, 488, 142 L.Ed.2d 492 (1998).

[11] *State v. Murrell*, 746 N.E.2d 986, 992 (Ohio 2002).

in such situations."[12] The Court noted the obvious advantages of a bright-line rule, stating that the "*Belton* court reached a calculated conclusion that a search of the motor vehicle incident to arrest.....is a reasonable one, justified principally by concerns for officer safety and preserving evidence."[13]

Despite Mercier's contention to the contrary, several courts have applied *Belton* to authorize the search of a passenger's personal effects incident to the arrest of the driver of the vehicle. A number of these courts sustained the search of a passenger's purse found in the vehicle following the arrest of the driver despite the absence of the passenger's consent to search.[14] In *Staten v. United States*, the court explained that the need for police to discover either hidden weapons which could be used against them or evidence which could be destroyed is no less crucial simply because a person other than the arrestee owns the "container" in which those items might be located. In fact, because of the number of people involved, the need may even be greater; third party ownership of a

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[12] *Id.*

[13] *Id.*

[14] *State v. Fladebo*, 779 P.2d 707, 711 (Wash. 1989); *State v. Moore*, 619 So.2d 376, 377 (Fla. 1993); *State v. Loftis*, 568 So.2d 121, 122 (Fla. 1990); *People v. McMillon*, 892 P.2d 879, 883 (Colo. 1995); *State v. Clarke*, 822 P.2d 138, 140 (Or. 1991); *People v. Prance*, 277 Cal.Rptr. 567, 572 (1991); *People v. Mitchell*, 42 Cal.Rptr.2d 537, 540 (1995). *See also United States v. Morales*, 923 F.2d 621, 626 (8th Cir. 1991); *Johnson v. Grub*, 928 F. Supp. 889, 908 (Mo. 1996).

container would not prevent the arrestee from gaining access to those items.[15]

In addition, this Court again addressed the issue of automobile searches in *Wyoming v. Houghton*, this time addressing the right of police to search items belonging to passengers in an automobile. The Court held that police officers with probable cause to search a vehicle may also inspect the property of passengers that may contain the object of the search.[16]

As noted in *Wyoming v. Houghton,* a criminal might be able to hide contraband in a passenger's belongings, with or without the passenger's knowledge or permission. Therefore, Justice Scalia commented that "[t]he sensible rule (*and the one supported by history and case law*) is that such a package may be searched, whether or not its owner is present as a passenger or otherwise, because it may contain the contraband that the officer has reason to believe is in the car."[17] In balancing the competing interests, the Court found that neither *Belton* nor *Ross* makes "a distinction among packages or containers based upon ownership. When there is probable cause to search for contraband in a car, it is reasonable for police officers like customs officials in the founding era to examine packages and containers without a showing of individualized probable cause for each one. A passenger's personal

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[15] *Staten v. United States*, 562 A.2d 90, 92 (D.C. 1989).

[16] *Wyoming v. Houghton*, 526 U.S. 295, 300, 119 S.Ct. 1297, 1304, 143 L.Ed.2d 408 (1999).

[17] *Id.* at 307, 119 S.Ct. at 1304.

belongings, just like the driver's belongings or containers attached to the car like a glove compartment, are 'in' the car, and the officer has probable cause to search for contraband *in* the car."[18] It is well accepted that "passengers, no less than drivers, possess a reduced expectation of privacy with regard to property that they transport in cars..."[19]

The common rationale in the case law since *Chimel*, both in this Court and the Ohio Supreme Court, is a preference for utilizing bright-line rules to aid and guide officers in the performance of their duties. But, Mercier now urges this Court to toss aside previous precedent, to blur that bright-line rule, and submerge appellate courts in a transcendental debate about what is or is not a container.

Purse as a Container v. Article of Clothing

Mercier trumpets Justice Breyer's concurrence in *Houghton*, where the issue of a woman's purse was specifically addressed.[20] At the outset, it is important to note that the concurrence stops well short of advocating a distinction between purses and other types of clothing. Indeed, Justice Breyer stated in his concurrence: "I cannot argue that the fact the container was a purse *automatically* makes a legal difference, for the Court has warned against trying to

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[18] *Id.* at 302, 119 S.Ct. at 1301.

[19] *Id.* at 303, 119 S.Ct. at 1302.

[20] *Houghton* (Breyer Concurring) at 308.

make that kind of distinction."[21] Instead, Justice Breyer merely suggests that a purse, if attached to a woman's person similarly to a man's billfold, *might* amount to "outer clothing" and would hence receive greater protection. Mercier has embraced Justice Breyer's suggestion and now asks this Court to extend it to its most extreme form.

This argument was considered, and rejected, by the majority opinion in *Houghton*. There, the Court drew a distinction between the intrusion suffered as part of a *Terry* body search and the diminished intrusion suffered by the examination of personal property found in an automobile.[22] The Court specifically cited to language from *Terry*, stating "[e]ven a limited search of the outer clothing...constitutes a severe, though brief, intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience."[23] The Court then distinguished the situation in *Houghton* from that in *Terry*, noting that the "traumatic consequences" associated with a pat-down search of the outer clothing of a suspect are not found with the search of a piece of personal property separate from the suspect.[24]

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[21] *Id.*

[22] *Id.* at 303, 119 S.Ct. at 1297.

[23] *Houghton* at 303, quoting *Terry v. Ohio*, 392 U.S. 1, 24-25, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

[24] *Id.*

Despite this language in *Houghton*, Mercier attempts to analogize a "purse in the lap" to a man's billfold. If accepted, this argument would blur the bright-line rule that has been established by both this Court. Adoption of Mercier's argument would serve only to complicate the currently settled state of the law regarding automobile searches, and would open a floodgate of questions, such as those asked by the Ohio First Appellate District: "Would police be permitted to search a purse that was on a passenger's lap, over her shoulder, between her feet, on the floor near her feet, hanging from the back of her seat, or in some other location?"[25]

Mercier argues that the location of the purse and the proximity to the passenger should be determining factors for distinguishing the current matter from the holding in *Houghton*. But when examined more closely, such a distinction between a purse and any other container is unfounded.

Mercier notes that purses "carry personal effects" and that a search of such would present a "great intrusion to the privacy of the owner." Although Mercier is dismissive of the *Houghton* majority's comparison of briefcases and purses, purses are far from the only items that contain personal effects. Men's briefcases frequently carry such personal items as identification, scheduling planners, address books, personal digital assistants, and wallets. Gym and duffel bags frequently carry the an individuals

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[25] *State v. Mercier*, Hamilton App. No. C-060490, 2007-Ohio-2017 ¶17.

personal items including clothing recently worn or about to be worn, wallets, cell phones, and other items unsuitable for possession while engaging in physical exercise or activity. Backpacks and knapsacks are frequently the repository of personal effects for school children, minors, and college students. And, what about diaper bags? Are we to now abandon years of case law and settled precedent regarding the search of containers in automobiles and not allow *any* container to be searched based upon ownership and location? This is precisely what the *Belton* court sought to avoid.

The inescapable conclusion to be drawn from all these hypotheticals is that a purse is no less a container than any other item that holds personal effects. The ability to search such a container should be bound by whether it can hold the object of the search rather than outdated notions that a woman's purse requires more protections than a similar item held by a man. The Fourth Amendment is not gender specific. To hold that a purse held by a woman is entitled to more protection than the same container held by a man may be politically correct, but such an argument is constitutionally indefensible.

Public Policy Reasons

Finally, as the Ohio First Appellate District noted in its opinion, there are several public policy reasons for not crafting a rule exempting a passenger's purse from search.[26] Not the least of these is preventing the

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[26] *Mercier* at ¶ 18.

destruction of evidence and protecting the officer's safety.

Here, Mercier was the passenger in a car as her co-defendant drove to a parking lot to sell drugs. She sat in the car as Hagedorn sold a half pound of marijuana literally feet from her. After Hagedorn's car was stopped, he offered up more drugs secreted in the center console just inches from Mercier. Given these facts, Mercier tacitly knew of the sale of drugs, if she was not a confederate in the drug sale. Crafting a rule that allows a passenger's purse to be exempted from search would give drug dealers a recipe to avoid confiscation of their product. It makes the passenger's purse a veritable "lock box" for drug dealers - immune from an otherwise constitutional search.

Under such a rule, all a drug dealer would need to do is keep his contraband in a passenger's purse. Then if stopped, the passenger and her purse would be exempt from search and the evidence of the crime would simply exit the car with the passenger. And what is to keep the passenger in this scenario from claiming multiple purses that she gets to remove? Under Mercier's rule, officers would not even be able to check the purse or purses to ensure it belongs to the passenger. Further, the rule would certainly apply to cases in which a car carries multiple passengers. Is each allowed at least one container upon exiting the vehicle?

As these scenarios illustrate, such a rule eviscerates the search authorized by *Belton* and *Houghton*. Anytime a passenger gets to leave with a container which could carry the object of the search,

the purpose of preserving the evidence is lost. Mercier's proposed rule would completely frustrate one of the rationales used by this Court in *Belton*.

Additionally, such a rule would also endanger police officers. Here, another reason Lt. Zumbiel gave for wanting to check Mercier's purse was because he was placing her in the back of his cruiser and was concerned the purse could contain weapons. In *Belton,* this Court noted that preventing defendants access to concealed weapons was another justification for such a search. A rule that exempts passengers' purses from search means that the officers have no way of knowing whether the passenger who has been removed from the vehicle is armed or not. Such a holding disregards the officer's need to provide for his own safety in light of the dangerous nature of the situation.

Consequently, a holding that exempts a passenger's purse from search would allow for the destruction of evidence and increase the risk to officers' safety. These two valid public policy reasons were the exact rationale this Court used to justify the search in *Belton*.

CONCLUSION

For years, this Court has sought to establish bright-line rules to inform officers when a search of an automobile is allowed. Adoption of Mercier's argument would cast doubt on such a rule and is contrary to the rationale of this Court in *Belton* and *Houghton*.

Additionally, a purse is a container just as any other item capable of holding personal effects. It is

entitled to no special constitutional protections as urged by Mercier.

Lastly, a rule allowing the passenger of a car in a *Belton* type search to remove items from the car effectively destroys the purpose behind such a search. Public policy requires that for the preservation of evidence and officer safety, officers should be allowed to search any containers passengers attempt to remove from the car before exiting.

For all these reasons, this Court should decline jurisdiction.

Respectfully,

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No. 08-17

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In the Supreme Court of the United States

LAURA MERCIER,

Petitioner,

v.

STATE OF OHIO,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Ohio

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SUPPLEMENTAL BRIEF FOR PETITIONER

This supplemental brief is filed pursuant to Rule 15.8 of the Rules of this Court to address the significance to the petition in this case of the Court's recent decision in *Arizona* v. *Gant*, No. 07-542 (Apr. 21, 2009). *Gant* adopted a narrow reading of *New York* v. *Belton*, 453 U.S. 454 (1981), holding that "police [may] search a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search" or "when it is 'reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.'" No. 07-542, slip op. at 10 (citation omitted). The petition in this case was filed on July 1, 2008, and it appears that the Court has been holding the petition pending the decision in *Gant*. The petition – which presents the question whether the Fourth Amendment requires probable cause for the search of a purse being worn or held by an automobile passenger when there *is* a basis for searching the vehicle – should now be granted.

Nothing in *Gant* diminishes either the need for review in this case or the importance of the question presented by the petition. The search in this case was affirmed by the court below, not under the authority of *Belton*, but "on the authority of *Wyoming* v. *Houghton*, 526 U.S. 295 (1999)." Pet. App. 1a. And *Gant* did not disturb, or even cite, *Houghton*. The facts of this case, where police officers learned of contraband in the searched vehicle prior to execution of the search (see Pet. App. 3a-4a) are identical in the relevant respects to those of *Houghton* (where it was ""uncontested * * * that the police officers had probable cause to believe there were illegal drugs in the

car," 526 U.S. at 300) – with the crucial difference that petitioner in this case was holding her purse on her lap when she was ordered to leave it in the car so that it could be searched. The decision in *Gant* accordingly does not answer the distinct question here, on which the lower courts are deeply divided.

Gant also does not make resolution of the question presented here less important, either practically or doctrinally. Notwithstanding the adoption of a narrow reading of *Belton*, searches of automobiles carrying passengers who are not themselves suspected of criminal activity – as in *Houghton* and this case – will remain a ubiquitous feature of this country's law enforcement. Wholly apart from *Belton*, "[i]f there is probable cause to believe a vehicle contains evidence of criminal activity, *United States* v. *Ross*, 456 U.S. 798, 820-821 (1982), authorizes a search of any area of the vehicle in which the evidence might be found." *Gant*, No. 07-542, slip op. at 13. And *Gant* itself indicates "that circumstances unique to the automobile context justify a search incident to arrest when it is reasonable to believe that evidence of the crime of arrest might be found in the vehicle." *Id.* at 2.

The question here is whether such a search also may extend to a purse that is worn or held by a passenger who is not herself suspected of criminal activity. Every search of an automobile that contains a passenger may present that question. Such cases, not involving *Belton* searches, arose before the petition in this case was filed and gave rise to the conflict described in the petition (see, *e.g.*, *State* v. *Boyd*. P.3d 419, 421 (Kan. 2003) (driver's consent was the legal basis for the search of the automobile)), and have continued to arise outside the *Belton* context in the months since the petition was filed. See, *e.g.*, *United*

States v. *Mataafa*,, No 08-286, 2008 WL 5100212, at *1 (E.D. Cal. Dec. 1, 2008) (police conducted an automobile search pursuant to the terms of the driver's parole; because officers refused to allow a backseat passenger to remove her purse when she exited the car, the court concluded that the search of the purse was impermissible under the Fourth Amendment); see also *People* v. *Baker*, No. F052913 164 Cal. App. 4th 1152 (Cal. Ct. App. July 15, 2008) (holding that driver's parole agreement did not permit police to search passenger's purse).

Moreover, the question whether a purse is a "kind of 'outer clothing,' * * * which under this Court's cases would properly receive increased protection" (*Houghton*. 526 U.S. at 308 (Breyer, J., concurring) (citing *Terry* v. *Ohio*, 392 U.S. 1, 24 (1968)), is one that arises repeatedly in a wide range of non-automobile contexts that will be wholly unaffected by the decision in *Gant*. See Pet. 16-17. There is every reason to expect that such cases will continue to arise with some frequency. See, *e.g.*, *People* v. *Dorsey*, No. 2805242008, WL 5046889 (Mich. Ct. App. Nov. 25, 2008) (Fourth Amendment prohibits search of a purse held by a bystander during execution of a search warrant for a home). Resolution of the question presented here will provide essential guidance in such cases.

The conflict in state courts of last resort that is described in the petition (at 8-13) – which turns on disagreement about whether the search of a purse being worn or held by a woman amounts to a search "of the person" – has nothing whatever to do with *Belton*. That conflict is not resolved by *Gant*. Because the question remains an important one that is squarely presented by this case, further review is warranted.

For the foregoing reasons and those presented in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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No. 08-17

In the Supreme Court of the United States

LAURA MERCIER,

Petitioner,

v.

STATE OF OHIO,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Ohio

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

This case addresses whether the Fourth Amendment permits police to search a purse worn or carried by a vehicle's passenger as part of a lawful search of that vehicle, in the absence of probable cause to search the passenger or the purse. As we demonstrated in the petition, and as numerous courts have recognized, the state courts of last resort are irreconcilably split on this question.

Respondent does not dispute the existence of this conflict. Nor does it deny that this case squarely presents an issue of fundamental national importance, determining the rights of vehicle occupants and the authority of police officers during routine and frequent roadside encounters. Instead, respondent's brief is devoted entirely to defending the decision below. Those arguments, addressed in the petition (at 17-22), provide no basis for denying review.

Respondent recognizes that "'[w]hen a person cannot know how a court will apply a settled principle to a recurring factual situation, that person cannot know the scope of his constitutional protection, nor can a policeman know the scope of his authority.'" Br. in Opp. at 7-8 (citation omitted). There is no better illustration of that proposition than the clear, persisting conflict among the state supreme courts on the question presented here. Review by this Court is warranted.

A. This Case Squarely Presents A Recurring Question Of Fourth Amendment Law That Has Sharply Divided State Courts Of Last Resort

Respondent does not deny the intractable split among the state courts of last resort on whether the

search of a purse worn or carried by a passenger incident to the lawful search of a vehicle violates the Fourth Amendment. As we show in the petition (at 8-12), a majority of the state supreme courts to address the issue, adopting the position of the concurring opinion in *Wyoming* v. *Houghton*, 529 U.S. 295, 308 (1999) (Breyer, J., concurring), have held that a purse that is worn or carried by its owner may not be searched incident to the search of an automobile in which the owner is a passenger. *State* v. *Boyd*, 64 P.3d 419 (Kan. 2003); *State* v. *Tognotti*, 663 N.W.2d 642 (N.D. 2003); *State* v. *Newsom*, 979 P.2d 100 (Idaho 1998). A minority, including the court below, has reached the contrary conclusion, holding that a purse being worn by its owner should be treated like any other container located in the automobile and therefore is subject to lawful search. Pet. App. at 1a; *State* v. *Steele*, 613 N.W.2d 825 (S.D. 2000). The brief in opposition makes no attempt to reconcile – in fact, fails even to mention – these conflicting lines of authority.

The conflicting positions of the state supreme courts are irreconcilable because the factual scenario presented in each of these cases is identical: A passenger, wearing or holding a purse, attempts to exit an automobile that is subject to police search. Police officers, who lack any probable cause or articulable suspicion with respect to the passenger or the purse, order the passenger to relinquish possession of the purse and leave it behind in the car. The officers then search the purse as part of the search of the vehicle. See Pet. at 8-13. The instant case presents just this recurring situation. Pet. App. at 4a, 9a. Respondent does not deny that state supreme courts are divided on how to interpret *Houghton* in these circumstances. The brief in opposition further does

not deny that this case presents an opportunity to resolve the conflict amongt the state courts on a significant constitutional issue. For this reason alone, review of the decision below is warranted.[1]

B. Respondent Erroneously Relies Upon *New York* v. *Belton*

Respondent's extensive reliance on this Court's decision in *New York* v. *Belton*, 453 U.S. 454 (1981), is entirely misplaced. See Br. in Opp. at 8-10, 15, 17. *Belton* applied the "search incident to arrest" exception to the warrant requirement to the search of an automobile, permitting the search of the jacket of a person who had been arrested. 453 U.S. at 457-62. As the Court explained in *Belton*, "the lawful custodial arrest justifies the infringement of any privacy interest the arrestee may have." *Id.* at 461 (emphasis supplied). *Belton* examined the rights of arrested individuals, and has no application to passengers not under suspicion. Numerous state courts addressing the question presented in this case accordingly have concluded that *Belton* "does not authorize a search of the passenger based solely on the arrest of the

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[1] Respondent offers a post-hoc justification for the search, namely that petitioner "tacitly knew of the sale of the drugs, if she was not a confederate in the drug sale" perpetrated by the driver of the vehicle in which she was a passenger. Br. in Opp. at 16. But this claim not only lacks support in the opinions below; it also flatly contradicts testimony that petitioner was not a suspect of any crime when police officers asked her to exit the car. Pet App. 4a, 9a. In the end, respondent's justification for the search boils down to petitioner's mere presence near a person subject to search, a position this Court has repeatedly rejected. See *United States* v. *Di Re*, 332 U.S. 581, 586-87 (1948); *Sibron* v. *New York*, 392 U.S. 40, 62-64 (1968).

driver." *Newsom*, 979 P.2d at 102; *Boyd*, 64 P.3d at 425-27; *Tognotti*, 663 N.W.2d at 648-49 (N.D. 2003).

Respondent points to ten lower court decisions that it claims "have applied *Belton* to authorize the search of a passenger's personal effects incident to the arrest of the driver of the vehicle." See Br. in Opp. at 10 & n. 14. These cases are wholly inapposite. As explained in the petition, there is a sharp split among the state courts of last resort on the meaning of this Court's decision in *Houghton*. The decisions respondent cites all pre-date *Houghton*; they have no bearing whatsoever on the persisting conflict over the proper interpretation and application of *Houghton*. None of the cases respondent cites involves the legal issue or factual scenario presented here.[2] Those decisions accordingly do not detract from the need for review of the issue presented by the petition.

As for respondent's contention that this issue was settled by *Houghton* (see Br. In Opp. 2, 12-14), that argument would seem to be belied by Justice

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[2] Contrary to respondent's description of the cited cases, five of them do not even involve non-arrested vehicle occupants. See *State* v. *Flabedo*, 779 P.2d 707, 709 (Wash. 1989); *State* v. *Clarke*, 822 P.2d 138, 138 (Or. Ct. App. 1991); *United States* v. *Morales*, 923 F.2d 621, 622 (8th Cir. 1991); *Johnson* v. *Grub*, 928 F. Supp. 889, 894 (W.D. Mo. 1996); *Staten* v. *United States*, 562 A.2d 90, 90-91 (D.C. 1989). The other cases involve either passengers who voluntarily left a container in a vehicle subject to search or are silent as to whether the police ordered the passenger to leave the container in the car. See *State* v. *Moore*, 619 So. 2d 376, 377 (Fla. Dist. Ct. App. 1993); *State* v. *Loftis*, 568 So. 2d 121, 122 (Fla. Dist. Ct. App. 1990); *People* v. *McMillon*, 892 P.2d 879, 880 (Colo. 1995); *People* v. *Prance*, 277 Cal. Rptr. 567, 569 (Cal. Ct. App. 1991); *People* v. *Mitchell*, 42 Cal. Rptr. 2d 537, 538 (Cal. Ct. App. 1995).

Breyer's analysis: he both *joined* the majority opinion in *Houghton and* opined that a purse being held by its owner "amount[s] to a kind of outer clothing which under the Court's cases would properly receive increased protection." 526 U.S. at 308 (Breyer, J., concurring). Respondent's reading of *Houghton* also has been rejected by the numerous state courts (and, for that matter, the several dissenting state-court justices) who have concluded, post-*Houghton*, that a purse being held by its owner is not subject to suspicionless search. The decision below, which contributes to a growing conflict about the meaning of an important holding of this Court, accordingly should be subject to further review.

CONCLUSION

For the foregoing reasons and those presented in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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